

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Notice of Proposed Rulemaking
Grid Resiliency Pricing Rule

Docket No. RM18-1-000

COMMENTS OF THE ORGANIZATION OF MISO STATES

On September 29, 2017, the Secretary (“Secretary”) of the Department of Energy (“DOE”) issued a Notice of Proposed Rulemaking (“NOPR”)¹ for final action by the Federal Energy Regulatory Commission (“FERC or Commission”) to establish just and reasonable rates for wholesale electricity sales and to provide “full recovery of costs” for certain eligible power generators.² The DOE transmittal letter states that the NOPR would enhance the resilience of the nation’s electric system and “protect the American people from energy outages expected to result from the loss of this fuel-secure generation.”³

The Organization of MISO States (“OMS”) is a non-profit, self-governing organization of representatives from each regulatory body with retail jurisdiction over entities participating in the Midcontinent Independent System Operator, Inc. (“MISO”) and serves as the regional state committee. The purpose of the OMS is to coordinate regulatory oversight among its members, to make recommendations to MISO, the MISO Board of Directors, the Commission, and other relevant government entities and state commissions as appropriate, and to intervene in proceedings before the Commission to express the positions of the OMS member agencies.

¹ *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 46940–46948 (10 Oct 2017) (“NOPR”).

² *Id.* at 46,940.

³ *Secretary of Energy’s Direction that the Federal Energy Regulatory Commission Issue Grid Resiliency Rules Pursuant to the Secretary’s Authority Under Section 403 of the Department of Energy Organization Act*, dated Sept. 28, 2017 at 6 (Secretary Letter).

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The OMS filed a Motion in Support for Extension of Time on October 3, 2017, stating that additional time was needed to provide all parties an opportunity to fully consider the myriad of issues presented in the NOPR, which were highlighted in the Request for Information issued by the Commission's Office of Energy Policy and Innovation ("OEPI") staff October 4, 2017. The OMS reiterates the gravity of the policy change proposed in the NOPR and the potential for unintended consequences that will be difficult to vet fully under the short timeframe provided in this docket. As explained below, significant infringement on the jurisdictional decisions of state and local regulators and unnecessary costs to customers are possibilities that demand proper due process and consideration. The OMS appreciates the opportunity to share its views on these important matters.

I. Introduction

The energy industry is in the midst of one of the most fast-moving and far-reaching transformations since its inception. From the increasing interconnectedness of the grid among states and regions, to policy and economic-driven resource changes, slowing load growth through greater efficiencies, and increasingly diverse supply on the customer side, change is happening at an unprecedented pace. This evolution has led to numerous policy changes at the local, state, and federal level to establish a framework to facilitate this new environment in a way that maintains supply adequacy, reliability, just and reasonable pricing for customers, and economic viability for

utilities and non-utility energy and service providers.

In this context, the NOPR was issued directing the Commission to, “develop and implement market rules that accurately price generation resources necessary to maintain the reliability and resiliency of our Nation’s bulk power system.”⁴ The proposed rule applies to units in FERC-approved ISOs or RTOs with capacity, day-ahead, and real-time energy markets, or the functional equivalents.⁵ Among other conditions, eligible electric generation resources (“eligible generators”) must be able to supply essential energy and ancillary services, have a 90-day fuel supply on site, be compliant with all applicable environmental directives, and not be subject to cost-of-service regulation by any state or local regulatory authority.⁶ The proposed rule would allow full cost recovery for eligible generators in FERC-approved tariffs, including a fair rate of return.⁷

The OMS recognizes that wholesale power markets do not compensate generators for all unique attributes and benefits a particular resource or type of resource provides to the grid. To address these concerns, the NOPR focuses on cost recovery for generation units with two broad attributes; grid reliability and resilience. Grid reliability has been the cornerstone of the electric system in modern times; keeping the lights on is the primary focus of utilities, local, state, and federal regulators, Independent System Operators, Regional Transmission Organizations, and Electric Reliability Organizations, among others. But resilience is a term less-well defined, particularly as it is, or should be, recognized in wholesale markets. Resilience is generally defined as, “the capacity to recover quickly from difficulties; toughness.”⁸ However,

⁴ NOPR at 46,945.

⁵ *Id.* at 46,948, referencing § 35.28 (g)(10)(ii).

⁶ *Id.* referencing § 35.28 (g)(10)(i).

⁷ *Id.* referencing § 35.28 (g)(10)(iii)(2)(B).

⁸ Dictionary.com definition of “resilience” accessed Oct. 17, 2017.

“achieving” resilience is dependent upon many factors, such as geography, impingement type(s), singular or multiple events, severity, area/facilities, frequency, and duration and involves much more than whether or not a particular type of generation is available (transmission and distribution system availability most importantly). To set the stage for these comments, the OMS recognizes resilience in things like fuel-assurance, reliability, security, etc., though a more specific definition may require additional feedback.

It is important to note, however, that the proposed rule will not address premature retirement of coal and nuclear units in vertically integrated states or under local control. The presumption that closures are all based on economic considerations alone may miss other causes leading to unit closures such as safety concerns, plant performance issues, and obsolescence. A capital market system should not skew the playing field by supporting inefficient electric generation units. If the NOPR is implemented as proposed, the resulting wholesale rates could be considered unjust and unreasonable.

Also, the OMS is focusing its comments on the applicability of the NOPR to the MISO footprint. Over 90 percent of the MISO footprint⁹ is served by traditionally-regulated utilities, for which reliability and resilience attributes, such as fuel diversity/fuel mix, long-term resource planning, generation construction and retirement, appropriate reserve margin, and utilization of wholesale market purchases are recognized and valued through state and local actions including, but not limited to, cost recovery through rate regulation, approval of long-term purchased power contracts, and integrated resource planning. As noted below, state and local regulators have primary jurisdiction over resource adequacy decisions under the Federal Power Act.¹⁰ As such,

⁹ See e.g. MISO, 2017-2018 Planning Resource Auction Results (May 10, 2017) (available at: <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170510/20170510%20RASC%20Item%2002a%202017-18%20PRA%20Summary.pdf>, visited Sept. 11, 2017).

¹⁰ 16 U.S.C. § 824(b)(1).

the provisions of the NOPR are unnecessary in the MISO region because the concerns raised therein are being addressed. Other RTO/ISO planning regions likely have different considerations based on market structure that the stakeholders in those regions can best address.

II. Comments

Even as the Midcontinent region faces additional power plant retirements in the coming years, there are a number of activities in motion to address the reliability and resilience concerns raised in the NOPR. The potential impacts of the ongoing change in resource mix driven by economics, environmental considerations, state, local, and federal policies, resource efficiency, etc. has been a focus for stakeholders and policy makers across the industry. Though the goals of the NOPR are laudable, it is important to recognize that there are numerous avenues, many of which are already in place or under development in MISO, to accomplish the goals.

If the elements of the NOPR go forward as proposed, the Commission should recognize the differences among market structures and regional needs. The MISO region is unique in that the majority of load is served by traditionally-regulated utilities under state and local jurisdiction where attributes of reliability and resilience are already considerations in resource planning and cost recovery decisions. Furthermore, the existing capacity construct in MISO is not relied upon to maintain adequate resources or to make decisions on new construction or retirements given the regulatory and market structure in MISO states. As such, MISO should be deemed exempt from the changes directed in the NOPR.¹¹ Finally, any application of the NOPR should be done in a

¹¹ The Illinois Commerce Commission (ICC) does not herein take a position on whether the Commission should exempt MISO, *ex ante*, from any rule that the Commission may adopt in response to the DOE NOPR. Rather, in determining whether an exemption for MISO would be in order the ICC would urge the Commission to assess the degree to which the long-term resource planning, fuel diversity/fuel mix determinations, generation construction/retirement oversight, and reserve margin/resource adequacy authority exercised by the state and local regulators in traditionally-regulated jurisdictions, in conjunction with the tools available to public policy makers in the restructured areas of MISO, are sufficiently regionally comprehensive, taken together, to achieve the resiliency and fuel security objectives set forth in the DOE NOPR.

way that respects regional differences, holds areas that have adequately addressed reliability and resilience harmless from additional requirements or charges that would likely result, and is non-discriminatory.

A. The Grid is Reliable and Resilient Today and Steps are Being Taken to Ensure Future Reliability and Resilience, Rendering the NOPR Unnecessary in MISO

The impact of lower market prices for energy and capacity with the utilization of low-cost natural gas has been an important point of discussion across the energy industry for several years. Significant analysis has been done and those with responsibility to ensure the reliability and resilience of the electric system have taken steps to prepare for the future. This work has culminated in plans at all levels that take into account future needs to maintain a robust and reliable electric grid. The specific actions taken at the state and local level, within the MISO footprint, and at FERC and NERC are discussed below.

The conclusions in the NOPR heavily relied upon the DOE Staff Report to the Secretary of the Department of Energy on Electricity Markets and Reliability (“Staff Report”)¹² and a Synopsis of Reliability Assessments¹³ provided by The North American Electric Reliability Corporation (“NERC”) in determining that immediate action is necessary to assure continued reliability and ensure resiliency.

However, the Staff Report did not identify an emergency situation in current markets or the existence of diminished reliability. Nor did it recommend that the DOE exercise its emergency powers. Instead, the report suggested that current market designs *may* be inadequate, and went on to highlight the ongoing work at the RTOs “toward recognizing, defining, and

¹² U.S. Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability, Aug. 2017 (“DOE Staff Report”).

¹³ NERC Letter to Secretary of Energy Rick Perry, May 9, 2017, Attachment “Synopsis of NERC Reliability Assessments” (“Synopsis”).

compensating for resource attributes that enhance reliability and resilience.”¹⁴ An urgent issue that was identified within the report was the “need for clear definitions of reliability- and resilience-enhancing attributes” with which the OMS agrees. Therefore, the OMS submits that the industry would be better served by addressing price formation issues in wholesale markets through a region-specific, measured approach in order to avoid any potential unintended consequences to the existing market designs and regulatory construct.

Similarly, the most recent NERC reports that are discussed in the synopsis provided to the Secretary do not call for immediate, far-reaching action. In fact, the 2016 report found “four assessment areas as having a medium resource adequacy risk” within the next five years.¹⁵ The report also states that the reliability of the North American bulk power system, excluding weather, remains within reliability objectives.¹⁶ NERC also participates in the Commission’s annual Technical Conferences on Reliability. Not one of NERC’s recent reports states an immediate reliability problem exists with the current bulk power system.^{17 18 19} Sufficient additional time is available to allow the processes in place at the local, state, regional, and federal level to address the concerns identified in the NOPR.

¹⁴ DOE *Staff Report* at 10.

¹⁵ Available at:

<http://www.nerc.com/pa/comp/CE/Compliance%20Violation%20Statistics/2016%20Annual%20CMEP%20Report.pdf>.

¹⁶ *Id.*

¹⁷ <http://www.nerc.com/news/testimony/Pages/NERC-Participates-in-FERC-Technical-Conference.aspx>.

¹⁸ <http://www.nerc.com/news/testimony/Pages/NERC-Participates-in-FERC-Technical-Conference-on-Reliability-.aspx>.

¹⁹ <https://www.ferc.gov/CalendarFiles/20170717080647-Sachs,%20NERC.pdf>.

i. State and Local Action in MISO Ensures Long-term Generation and Grid Reliability and Resilience

Within their authority under the Federal Power Act,²⁰ state and local regulators in the MISO region have taken proactive steps to address long-term resource adequacy and resilience. Existing planning processes are able to account for a wide variety of factors. State and local action includes making determinations over the appropriate fuel mix, cost recovery for utility-owned and utility-contracted generation resources, new investment and generation siting, distribution system investment, and power plant retirement decisions, all of which reflect state and local risk tolerances and the amount they are willing to pay to manage those risks. Although there have been increasing retirements of traditional baseload generation in recent years, they may have been caused by considerations that go well beyond wholesale market conditions. Many were the result of generators reaching their expected end of life (or beyond), safety concerns, costly capital investments, and plant performance issues (e.g., high forced outage rates).

The attributes²¹ that DOE identified as not being valued in wholesale markets are regularly accounted for through state and local resource planning and policies in the vast majority of the MISO region. State and local regulators evaluate their jurisdictional utilities' resource decisions and reliability as part of their statutory responsibilities. They consider not only the consequences of those decisions over the near-term, but also the effects of these decisions 10, 20, 30, and sometimes 40 years into the future. During this process, state and local regulators analyze their jurisdictional utilities' capacity costs as well as other valuable attributes, including

²⁰ 16 U.S.C. § 824(b)(1) of the Federal Power Act reserves to states jurisdiction, “over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.”

²¹ DOE *Staff Report* at 11.

those that the DOE emphasizes in this proposed rule. This includes fuel diversity, fuel assurance, and generator performance under a range of operating conditions. State and local regulators gather and review evidence from industry experts, environmental experts, consumer advocates, industry trade groups and other affected stakeholders as part of the decision-making process. Regulators hold hearings where local, regional, and sometimes national interests are represented and considered by the individual regulators and their staff. Importantly, cost recovery is provided through rate regulation and this oftentimes extends to baseload generation of independent power producers operating under bilateral contracts with regulated or non-profit electric utilities.

Even states that have adopted restructuring in MISO can value various attributes through other state policies as has occurred in Illinois and Michigan. For example, Michigan Public Acts 341 and 342 of 2016, effective April 20, 2017, updated Michigan's energy laws relating to electric capacity resource adequacy and established an integrated resource planning process. Under the new laws, the Michigan Public Service Commission is implementing a state reliability mechanism to ensure all electric providers - electric cooperatives, municipal utilities, investor-owned utilities, and alternative electric suppliers - secure through ownership or contract adequate electric generation capacity to meet customers' future needs.

In addition, in December 2016, Illinois Governor Rauner signed the Future Energy Jobs Act. One part of the Act is designed to prevent premature retirement of nuclear plants through zero emissions credits. The intent of zero emission credits is to address a flaw or gap in current wholesale electric price formation in a manner that fits within states' generation oversight and environmental action authority.

In addition to resource and distribution planning generally, retail regulators typically monitor resource availability issues, including fuel diversity and assurance, for jurisdictional entities under the basic tenet of utility regulatory authority: ensuring safe and reliable utility service at reasonable rates. Enabling statutes encompass maintaining adequate fuel as a means to ensure reliable service in a cost-effective manner. Under the traditionally-regulated framework retail regulators rely on the tools of cost recovery and fuel adjustment clauses to oversee fuel assurance issues. OMS has been working collaboratively with MISO to provide regional visibility of fuel assurance in recognition of the changing fuel mix.²²

ii. Regional Action is Underway in MISO to Ensure Long-term Bulk Electric System Resilience and Reliability

There are many ongoing activities at the regional-level to address any resilience and reliability concerns caused by retirements of older baseload facilities. First, the growing trend of increasing regional cooperation and geographic diversity expands the resources available to support reliability and resilience. The integration of Entergy into MISO, WAPA and Basin (the Integrated System) joining SPP, and the ongoing regionalization discussions in the Mountain-West and West all highlight this trend. Increasing the geographic diversity of an RTO inherently adds resilience to its system. As NERC explains, “the system is interconnected, and the integrated networks work together to maintain reliability through both wide-area interregional planning and coordinated system operations.”²³ Since the majority of RTOs are a part of the Eastern Interconnection (EI), increasing the resilience of one EI RTO reinforces the resilience of

²² See OMS MISO Fuel Assurance Survey, 2017 Results, available at: <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170712/20170712%20RASC%20Item%2002%20OMS%20Survey%20Results.pdf>.

²³ NERC Synopsis at 1.

all. This was demonstrated by the RTO coordination to maintain reliability in the Midcontinent and Northeast during the Polar Vortex.

Also, within MISO, extensive monitoring and planning take place in conjunction with stakeholders to ensure reliability, resilience, and security of the Bulk Electric System (“BES”). The accuracy of price formation and the impact that fuel-mix changes are having on essential reliability services are actively reviewed through the MISO Reliability Subcommittee and Markets Subcommittee. MISO and its stakeholders, which includes the Independent Market Monitor, have been actively working on these issues to make appropriate improvements. For example, MISO has enhanced its capabilities to monitor and better understand the increasing reliance on natural gas-fueled generation within its footprint as a means of enhancing fuel assurance. This included hiring dedicated staff, opening direct lines of communication with interstate gas pipelines, conducting an annual fuel report for gas facilities, and increasing the amount of information available to system operators related to fuel supply. MISO has also made changes to how energy is priced during emergency situations and created a ramp product to manage increases in variable generation on its system to incentivize the availability of needed generation.

Since 2009, MISO has provided monthly reports²⁴ on its public website regarding real time operations. These reports can be used to highlight the interactions of the resource mix with the transmission system, providing a feedback loop on the planning processes for both. If a pressing reliability concern were to develop within the MISO footprint, stakeholders have information and processes in place to identify, react to, and remedy the specific issue.

²⁴ See: <https://www.misoenergy.org/Library/Pages/ManagedFileSet.aspx?SetId=3389>.

MISO has also utilized price formation to address changes in the wholesale market by developing a detailed Market Roadmap process to identify, rank, and implement key strategic issues that shape future market design and price formation enhancements. These have included Extended-LMP reforms, emergency pricing and demand response, a ramp capability product, and five-minute settlements, all of which provide price signals to generation owners to be available when needed.

MISO's most important responsibility is maintaining and managing reliability. It does this through solid partnerships with transmission operators and local balancing authorities and coordination with state and local regulators. These partnerships are reinforced through open communication and a shared understanding of the policies, procedures and tools that support regional reliability. The Polar Vortex, which the Secretary cites as a reason for urgent action, exemplifies how MISO's existing processes and procedures were able to maintain system reliability even during extreme conditions.²⁵ During this event, MISO had a level three Energy Emergency Alert in one of its reliability coordination areas.²⁶ MISO stated it was "able to effectively manage system assets to maintain the reliability of the bulk power system within its region, *while also supporting and assisting neighboring entities in their efforts to do the same.* MISO's market functions performed as expected during the event." (*Emphasis added.*)²⁷ MISO's ability to handle this extreme weather event and provide support to a neighboring RTO was largely enabled by the fact that state and local resource planning and ratemaking processes promote investments in reliability, such as weatherization of electric generators, cost recovery

²⁵ *Secretary Letter* at 3.

²⁶ MISO Real Time Ops Report to MISO Reliability Subcommittee (January 2014), available at: https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RSC/RS%20Reports/2014%20RS%20Reports/201401%20January_RS_Reportx.pdf.

²⁷ MISO 2013-2014 MISO Cold Weather Operations Report at 10.

for prudent investments to maintain existing generation facilities, enhancement to compression and other gas storage capabilities, and firm fuel supplies for gas generation.

This is supported by the NERC assessment of the event.²⁸ The report explained that within the Midwest region “generator owners recognize the reliability significance of outages and the market incentives for availability and continue to look for ways to improve capacity availability during cold weather.”²⁹ This highlights the important connection between market structure and reliability, which was correctly pointed out in the Secretary’s letter to FERC.³⁰

The MISO transmission planning process is also an important tool to support reliability and resilience in the face of a changing resource mix by planning for a wide variety of potential outcomes and evaluating a set of “futures” that analyze possible scenarios to inform transmission investment decisions. These futures are developed by MISO and its stakeholders and incorporate planned generation as well as feedback on the feasibility of unplanned generation that has the potential to come online beyond the typical generator planning horizon. The process is another example of state and local regulators and MISO working collaboratively to ensure reliability while recognizing the varying responsibility that each party has. Over \$33 billion in new transmission has been approved by MISO, with \$15.4 billion of this amount in service.³¹

iii. Federal Agencies with Responsibility for BES Reliability and Resilience are Actively Addressing Concerns

FERC and NERC, in conjunction with RTOs, state and local regulators, and other stakeholders, are actively addressing many of the issues identified in the NOPR as explained

²⁸ NERC *Polar Vortex Review* at 7-9 (Sept. 2014). The MRO region saw 1,379 MW of unit outages related to cold, while the Reliability First region lost 5,300 MW due to cold weather.

²⁹ *Id.* at 7.

³⁰ *Secretary Letter* at 4.

³¹ MISO MTEP17 Report, Book 1, Section 3.1, pg 38, available at <https://www.misoenergy.org/Library/Repository/Study/MTEP/MTEP17/MTEP17%20Full%20Report.pdf>.

below. The letter from the Secretary correctly recognized these ongoing actions. It is important to understand the efficacy of these efforts and the expertise of those involved to appropriately maintain the long-term reliability and resilience of the BES.

a. FERC Activity

FERC has been active to ensure RTOs foster wholesale electric markets and transmission planning that deliver reliable and economically efficient outcomes. Price formation enhancements have been a key, market-driven tool to address the continual changes in the resource mix. As stated by the OMS in previous written comments to MISO on price formation, all price formation initiatives must result in a net benefit to ratepayers or help achieve an established reliability standard.³² If a price formation analysis cannot meet this standard, it should not be adopted. The public interest standard should apply when analyzing the costs and benefits of any price formation proposal to determine which initiatives are the most beneficial to customers and ratepayers.³³

FERC has multiple open dockets that will further the work on accurate price formation in wholesale markets:

- RM17-3 - valuing and pricing fast-start resources in wholesale markets;
- AD17-11 - possible paths forward to reconcile the wholesale competitive market frameworks with states' actions;
- RM16-23 - participation models for electric storage in energy markets;
- ER17-1570, ER17-1571, and RM16-5 - energy offer caps in compliance with FERC Order 831
- RM16-6 - essential reliability services and the evolving Bulk-Power System Primary Frequency Response

³² See

<https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/AC/2015/20150826/20150826%20AC%20Item%2002%20OMS%20Hot%20Topic%20Comments.pdf>.

³³ *Potomac Elec. Power Co. v. F.E.R.C.*, 210 F.3d 403, 406 (D.C. Cir. 2000).

b. NERC Activity

NERC serves a critical role in sharing information that is then used by regulators, RTOs, and others to evaluate potential reliability concerns. This information sharing and educational aspect of NERC is exemplified by the regular reliability assessments that it conducts as well as the review reports that get produced after an event. As discussed earlier, the members of OMS and MISO regularly review these documents and address suggested recommendations through existing processes.

The OMS is also aware that NERC has been very active in looking to the future for potential reliability issues, including addressing many aspects of resilience. Through its Essential Reliability Services Working Group, NERC has proactively set out to understand the various components that are needed to maintain system reliability in the face of a changing resource mix and share its findings with those responsible for making resource decisions (state and local regulators) and those responsible for operating the BES (RTOs). This working group is also focused on Distributed Energy Resources (“DER”) and their potential impacts on the BES. Both of these efforts will assist regulators and RTOs to maintain a reliable and resilient system by informing their respective planning processes.

B. Regional Differences Should be Recognized and Respected

The Commission has a long history of finding that significant differences exist between the MISO region and the eastern RTOs and these differences warrant a different approach to resource adequacy. Just as the Commission has found that other aspects of capacity markets, (i.e., minimum offer price rules, downward sloping demand curves, forward procurement, and

mandatory participation) found in the eastern RTOs are not necessary or appropriate for MISO,³⁴ the Commission should exempt MISO from this rule.³⁵

As stated previously, over 90 percent of the load in MISO is served by traditionally-regulated utilities that operate under cost of service rates determined by state and local retail regulators. Though the ‘scope of application’ states that “the requirements of this rule shall apply to Commission-approved independent system operators or regional transmission organizations with energy and capacity markets...,” the nature of the capacity auction in MISO serves a different function than the majority of the deregulated RTOs in the east.³⁶ MISO’s voluntary capacity auction is not relied upon for making resource entry and exit decisions because those decisions are made within state and local processes. Instituting new requirements at the RTO-level that will conflict with retail regulators’ ability to ensure just and reasonable rates and make determinations about the appropriate mix of resources could impact the willingness to continue allowing jurisdictional utilities to participate in RTOs.

Although the proposed rule allows RTOs to show they already comply with the proposed reforms,³⁷ the lack of details contained within the proposed rule make it unclear what would constitute compliance. This is exemplified by the questions posed by the Commission’s OEPI staff, specifically the section on “General Eligibility Requirements.”³⁸ Questions about whether

³⁴ *Midwest Ind. System Operator, Inc.* 153 FERC ¶ 61,229, P 35, 52 (Nov, 20, 2015).

³⁵ The ICC does not herein take a position on whether the Commission should exempt MISO, *ex ante*, from any rule that the Commission may adopt in response to the DOE NOPR. Rather, in determining whether an exemption for MISO would be in order the ICC would urge the Commission to assess the degree to which the long-term resource planning, fuel diversity/fuel mix determinations, generation construction/retirement oversight, and reserve margin/resource adequacy authority exercised by the state and local regulators in traditionally-regulated jurisdictions, in conjunction with the tools available to public policy makers in the restructured areas of MISO, are sufficiently regionally comprehensive, taken together, to achieve the resiliency and fuel security objectives set forth in the DOE NOPR.

³⁶ NOPR at 46948, reference to § 35.28 (g)(10)(ii).

³⁷ *Id.* at 46946.

³⁸ Request for Information, Grid Reliability and Resilience Pricing, Docket No. RM18-1-000 (Oct. 4, 2017).

the NOPR applies to cooperative or municipal utilities, if the 90-day fuel requirement applies at all times, how it would impact a refueling nuclear facility, whether and how it applies to merchant facilities under long-term contracts with retail cost-of-service regulated utilities, etc. make it extremely difficult to determine compliance, particularly in the short 15-day compliance period. Nonetheless, for the reasons stated above, the rule is not needed in MISO to accomplish the stated goals of reliability and resiliency so MISO should be exempt.

C. The Rule Should Hold Areas that Have Addressed Reliability and Resilience Harmless and Protect Against Negative Consequences

Implementation of the NOPR, even with the requested exemption of MISO, has the potential to negatively impact ratepayers within MISO, including those that do not rely on eligible generators to meet their resource adequacy needs, and must be limited. Depending on how RTOs allocate costs to customers, those who are paying for state- and local-determined reliability and resiliency and including the benefits from participation in the larger regional market may have to pay again through the RTO for the same services. For example, the costs for procuring ancillary service market products within MISO are spread over large geographical regions, reflective of the needs of the transmission system. If these zones were also used to allocate costs for essential reliability services provided by eligible generators in this proposed rule, double payment would be all but certain. In addition, one set of generation owners and customers would be subsidizing another.

Additional harm could stem from negative impacts to both the energy market and the bilateral market for capacity. Energy market pricing impacts stemming from inefficient units remaining online longer than economically optimal could impact all market participants regardless of the amount of investment required to keep these units running. Lastly, traditionally-regulated utilities within MISO regularly contract with independent power

producers who own baseload facilities using long-term power purchase agreements that may be fixed or at above-market rates, or may have capital pass-through mechanisms that work very similarly to cost of service regulation. This rule could disrupt and raise prices in the otherwise competitive bilateral contract market that exists within MISO by providing an easy out for generators that meet the eligibility requirement to fully recover their costs, avoiding price discovery through contract negotiation.

To avoid these potential negative consequences, the Commission should structure the rule in a way that considers the impact to areas that have addressed reliability and resiliency and ensures customers in these areas are not forced to pay twice for attributes or services for which they already pay.

D. The Rule Should be Applied in a Neutral, Non-Discriminatory Manner that is Not Based on Resource Type

FERC is required to set rates and charges that are just and reasonable and do not, “make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.”³⁹ Properly-functioning energy markets require a comprehensive, common-sense approach to price formation to allow all generation resources and all technologies, including coal and nuclear generators, to bring their unique strengths and attributes to the resiliency of the BES. This approach must recognize the services required to maintain the system and establish a mechanism for just and reasonable compensation, while also recognizing that these services may be valued through retail ratemaking in traditionally-regulated areas. The NOPR must be implemented in a way that allows all resources that can meet the criteria of “fuel-secure” and provide reliability and resilience attributes to be similarly recognized, treated, and compensated.

³⁹ 16 U.S.C. § 824(d)(b).

Although resilience has not yet been specifically defined,⁴⁰ it's clear the appropriate definition goes beyond the narrow interpretation of this proposed rule. Resilience and reliability actions are performed every day by merchant and regulated generators, and many actions that enable faster recovery from unimagined events all contribute to system resilience. There are many examples that illustrate how on-site fuel does not guarantee continued operation of a generator during extreme weather events, including the Polar Vortex and hurricane Harvey. Furthermore, fuel supply emergencies make up a negligibly small percentage of total time customers are without electricity.⁴¹ As stated above, there are many factors that impact resilience and they can be different across regions and states. Therefore, “a one-size fits all” 90-day fuel supply requirement will not ensure a resilient system, nor has a justification been provided that this is appropriate in all regions.

The goals of this proposed rule are best achieved through technology neutral, market-driven price formation policies. All providers of energy and ancillary services should be compensated in a comparable manner. RTOs and state commissions strive to develop equitable tariffs including cost sharing and prices for services to give no advantage to one customer over another. The proposed rule could lead to an unequitable cost to some customers while benefiting others.

III. Conclusion

For the reasons stated above, the Commission should respect the jurisdictional role of state and local regulators and exempt the MISO region from the provisions of the NOPR. Further, implementation of the NOPR should be done in a way that holds regions like MISO that have

⁴⁰ *Staff Report* at 10.

⁴¹ Rhodium Group, *The Real Electricity Reliability Crisis* (Oct. 3, 2017).

addressed reliability and resilience harmless from negative impacts and is non-discriminatory as to the resources utilized to achieve these goals.

The following members of the OMS join in these comments: Arkansas Public Service Commission, Iowa Utilities Board, Louisiana Public Service Commission, Michigan Public Service Commission, Minnesota Public Utilities Commission, Missouri Public Service Commission, Mississippi Public Service Commission, Montana Public Service Commission, New Orleans City Council, South Dakota Public Utilities Commission, and the Public Service Commission of Wisconsin,

OMS Associate Members the Minnesota Department of Commerce, Minnesota Attorney General's Office, and Citizens Utilities Board of Wisconsin also join.

The North Dakota Public Service Commission votes against the comments. The Indiana Utility Regulatory Commission, Illinois Commerce Commission, Kentucky Public Service Commission, and Public Utility Commission of Texas⁴² abstain. The Manitoba Public Utilities Board did not participate in the vote.

⁴² The Public Utility Commission of Texas (PUCT) does not join in these OMS comments. However the PUCT agrees with the OMS's assertion that the rule as proposed would not apply to MISO; MISO does not have a mandatory capacity market. Additionally, the PUCT notes that many owners of generation in MISO are vertically-integrated, rate-regulated utilities which are already entitled to a reasonable return on their prudently-incurred capital costs.